

# LEGAL SERVICES

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### MEMORANDUM

May 10, 2022

**SUBJECT:** Constitutional concerns and drafting notes  
(CSHB 234(STA) am(efd fld);  
Work Order Nos. 32-LS1197\W.A.8 and W.A.9)

**TO:** Senator Mike Shower  
Attn: Scott Ogan

**FROM:** Alpheus Bullard  
Legislative Counsel



The following memorandum accompanies the two amendments described above. Given the time allotted, please accept the following abbreviated comments.

#### **Single subject issue**

As you know, the Constitution of the State of Alaska requires all bills to be confined to one subject. CSHB 234(STA) am(efd fld) relates to political contributions and the Alaska Public Offices Commission (commission), the agency tasked with enforcement. Your amendments relate to (1) political parties and political groups determining which state and federal candidates on a ballot may be designated as affiliated with the party or group, and (2) prohibiting the use of funds automatically deducted from a paycheck for contributions and expenditures unless the employee approves the use of the funds for that purpose. Your first amendment relates to election administration, this may not be interpreted as sharing a single subject with the substance of the existing bill. I can not say whether an Alaska court would find that the administration of elections and the regulation of campaign contributions can be united beneath a single subject. Your second amendment relates to contributions and would likely be interpreted fall within the same general subject.

#### **Title change resolution**

Both accompanying amendments require changes to the title of CSHB 234(STA)am (efd fld). Because the bill is in the second body, if either of these amendments is adopted, the bill will require a title change resolution. Also, because the personal bill deadline has passed, the title change resolution must be sponsored by a standing committee. If you would like us to draft a title change resolution, please let us know.

#### **Amendment 32-LS1197\W.A.8**

You asked for an amendment that would, in relevant part, (1) require a candidate to meet the rules of a political party or political group to be listed on the ballot as affiliated with

that party or group; (2) require a party or group's authorization for a candidate to be listed on the ballot as affiliated with that party or group; and (3) require a candidate to be authorized by a party or group to receive contributions from that party or group or subdivisions of that party or group.

The accompanying amendment provides that a candidate may not be designated as affiliated with a party or group on the ballot unless the party or group approves the candidate. The amendment does not require the candidate to meet the party's or group's rules or provide which candidates a party or group, or their subdivisions, may contribute to. I did not include these elements because, if the party or group must approve a candidate for the candidate to be designated as affiliated on the ballot, the party or group is already empowered to decide whether the candidate meets party or group rules, and similarly, state assistance should not be required to prevent a party or group from contributing to a candidate whom it does not approve. Note these elements of the request also raise constitutional issues relating to improper delegation of legislative power and the First Amendment.

The amendment may still raise constitutional issues, because it subordinates the state into acting as part of a political party's or group's messaging apparatus. While a party or group has a First Amendment right to determine who best represents the party and to put that person forward as the party's or group's standard bearer,<sup>1</sup> this associational right may not be interpreted to mean a right to control how a candidate affiliated with that party is presented on the state's election ballot. It is the state that has the right to regulate the ballot to ensure fair elections<sup>2</sup> and a party or group is not already without the means (outside the ballot) of communicating to its members who the party's or group's preferred candidates are. The purpose of a ballot is not to serve as a platform for a political party to

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<sup>1</sup> *California Democratic Party v. Jones*, 530 U.S. 567 (2000). In *Jones*, the court found that California had established an election system in which (1) the primary was a process that nominated political party candidates, but (2) independent voters, unaffiliated voters, and adherents of rival parties were able to participate in the nomination process. This system allowed for the possibility that the nominee of a political party would not be the person who would have been selected by the members of the party, severely burdening the party's First Amendment rights of political association by forcing them to associate with voters that did not share their beliefs.

*See also State v. Alaska Democratic Party*, 426 P.3d 901, 904 (Alaska 2018) (permitting a state political party to allow unaffiliated persons to run in the party's primary election notwithstanding a statute requiring such persons to be party members); and *State v. Green Party of Alaska*, 188 P.3d 1054 (Alaska 2005) (state law prohibiting political parties from sharing a combined primary election ballot burdened parties right to determine who could participate in its primary).

<sup>2</sup> *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997).

advertise its nominees. As the Supreme Court explained in upholding a Minnesota state law that prohibited fusion candidacies:<sup>3</sup>

We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidates and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.<sup>4</sup>

Accordingly, to defeat any legal challenge (if this amendment is adopted and the bill is enacted), you should speak to the legitimate state purposes served by the amendment.

#### **Amendment 32-LS1197\W.A.9**

This amendment prohibits the use of funds derived from automatic payroll deduction programs for political contributions and independent expenditures without the paying employee's consent.

The amendment raises an issue under the First Amendment of the Constitution of the United States which protects freedom of speech. Campaign contributions are a form of political speech protected by the First Amendment.<sup>5</sup> The United States Supreme Court has identified only one legitimate governmental interest for restricting campaign contributions: preventing corruption or the appearance of corruption.<sup>6</sup> Any statutory effort to restrict or burden the exercise of a First Amendment right must be "narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society."<sup>7</sup>

In assessing the constitutionality of this amendment, the relevant question for a court would be whether the prohibition imposed by the amendment is consistent with the state's compelling interest in preventing corruption and the appearance of corruption and whether it "burden[s] substantially more speech than is necessary to further the government's legitimate interests."<sup>8</sup>

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<sup>3</sup> A fusion candidacy is an arrangement where two or more political parties on a ballot list the same candidate, pooling the votes for that candidate.

<sup>4</sup> *Id.* at 362 - 63.

<sup>5</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>6</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>7</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 611 - 612 (1973) (citations omitted).

<sup>8</sup> *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 619 (Alaska 1999), quoting *California Prolife Council v. Scully*, 989 F. Supp. 1282, 1296 (E. D. Cal. 1998), quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

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I cannot say whether prohibiting the use of funds from these deductions would be found by a court to be a narrowly drawn measure to prevent corruption and the appearance of corruption. Much depends on the facts. In support of this amendment, you should include for the record why you believe prohibiting these deductions is narrowly tailored to the state's compelling interest in preventing corruption and the appearance of corruption.

If you have questions, please do not hesitate to contact me.

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Attachment